United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

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Court of Appeals, District of Columbia

APRIL TERM, 1903.

210

No. 1291.

THE DISTRICT OF COLUMBIA, APPELLANT,

vs.

CHARLES B. CROPLEY, GEORGE G. BOTELER, AND JOHN D. G. CRAMPTON.

No. 1292.

CHARLES B. CROPLEY, GEORGE G. BOTELER, AND JOHN D. G. CRAMPTON, APPELLANTS,

vs.

THE DISTRICT OF COLUMBIA.

APPEALS FROM THE SUPREME COURT OF THE DISTRICT OF COLUMBIA

FILED MARCH 25, 1903.

COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

APRIL TERM, 1903.

No. 1291.

THE DISTRICT OF COLUMBIA, APPELLANT,

vs.

CHARLES B. CROPLEY, GEORGE G. BOTELER, AND JOHN D. G. CRAMPTON.

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THE DISTRICT OF COLUMBIA.

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INDEX.

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., APRIL 17, 1903.

In the Court of Appeals of the District of Columbia.

THE DISTRICT OF COLUMBIA, Appellant,
vs.
CHARLES B. CROPLEY ET AL. } No. 1291.

CHARLES B. CROPLEY ET AL., Appellants,
vs.
THE DISTRICT OF COLUMBIA. } No. 1292.

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a Supreme Court of the District of Columbia.

CHARLES B. CROPLEY, GEORGE G. BOTELER, and John D. G. Crampton, Plaintiffs,
vs.
THE DISTRICT OF COLUMBIA, Defendant. } No. 44419. At Law.

UNITED STATES OF AMERICA, *District of Columbia,* } *ss:*

Be it remembered, that in the supreme court of the District of Columbia, at the city of Washington, in said District, at the times hereinafter mentioned, the following papers were filed and proceedings had, in the above-entitled cause, to wit:—

1 *Declaration, &c.*

Filed January 8, 1901.

In the Supreme Court of the District of Columbia.

CHARLES B. CROPLEY, GEORGE G. BOTELER, and John D. G. Crampton, Plaintiffs,
vs.
THE DISTRICT OF COLUMBIA, Defendant. } At Law. No. 44419.

The plaintiffs sue the defendant, a municipal corporation, incorporated under the laws of the United States.

1. For that, at the time of the committing of the grievances hereinafter mentioned, to wit, from the 23rd day of November, 1896, to the present time, the plaintiffs were lawfully seized and possessed of a certain tract of land known and distinguished upon the public plats and plans of the former city of Georgetown, in the District of

Columbia, as and being lots twenty-seven (27), twenty-eight (28) and part of lot twenty-nine (29) of the "Water lots" so-called, the same being described in one parcel as follows: Beginning at a point on the south side of Water street, at the northwest corner of said lot numbered twenty-seven (27), and running thence westerly with the south line of Water street eighty-one (81) feet six (6) inches to the northwest corner of said lot numbered twenty-eight; thence southerly with the west line of said last mentioned lot, fifty-six (56) feet; thence due west, twenty-two (22) feet and six (6) inches; thence southerly
2 by and with the west side of a tail race as now existing, one hundred and twenty-eight (128) feet and three (3) inches to the wharf line of the Potomac river and continuing the same course onward to the middle of the channel of said river; thence by and with the middle of the channel to a point which will be intersected by the east line of said lot numbered twenty-seven (27) protracted to said middle of the channel, and thence by and with said last mentioned line reversed to the place of beginning, whereon was a wharf or dock theretofore built by the plaintiffs in order that access by water might be had to said land and premises, through, over, and upon which land and premises at the time of the committing of said grievances by the defendant there was flowing a stream of water which, but for the committing of said grievances by the defendant could and would have been used as a source of water power of great force, to-wit, of the force of one hundred (100) horse power and which said land and premises were at the time aforesaid, of great value, to wit, of the value of $40,000.00 (including the value of said water power) and had a great annual rental value, to wit, an annual rental value of $4,000.00 (including the rental value of said water power), yet the defendant, well knowing the premises, but contriving and wrongfully and unjustly intending to injure the plaintiffs and to deprive them of the use, benefit and enjoyment of said premises and appurtenances, and particularly of said water power, heretofore, to wit, on the 23rd day of November, 1896, and thence until, to wit, the 15th day of January, 1899, wrongfully and injuriously kept and maintained a certain public sewer having an outlet at or near the northern line of said premises and by means of said
3 sewer the said defendant continuously during said last mentioned period unlawfully, wrongfully and injuriously discharged into said stream and over, upon and across said land and premises of the plaintiffs large quantities of sewage, night soil and other filth, whereby the plaintiffs were deprived of the use and enjoyment of a large portion of their said premises, and from using or leasing to others said water power, and from using or leasing to others said land with said water power, thereon, and whereby also large quantities of earth, sewage, filth, sand and other solid material were deposited in the Potomac river immediately in front of and adjacent to the plaintiffs' said wharf, so as to injuriously interfere with access to said wharf and premises by water, and whereby also offensive, ill-smelling and noxious gases, emanating from said sewer and from

the matter discharged therefrom, as aforesaid, were carried to, on and over the plaintiffs' said premises, in consequence of which several wrongful acts of the defendant, during the entire period aforesaid, to wit, from the 23rd day of November, 1896, till the 15th day of January, 1899, the value to the plaintiffs for their own use and the value for rental to others of said land and premises were greatly depreciated and the value for their own use or for rental to others of said water power and of said land and premises and said water power together, were entirely destroyed, all to the damage of the plaintiffs in the sum of ten thousand dollars ($10,000.00), wherefore they bring their suit.

And the plaintiffs claim under this count the sum of ten thousand dollars ($10,000.00).

4 2. For that at and prior to the time of the committing of the grievances hereinafter mentioned, to wit, from the 15th day of January, 1899, to the present time, the plaintiffs were lawfully seized and possessed of a certain tract of land known and distinguished upon the public plats and plans of the former city of Georgetown, in the District of Columbia, as and being lots twenty-seven (27) twenty-eight (28) and part of lot twenty-nine (29) of the "Water lots," so-called, the same being described in one parcel as follows: Beginning at a point on the south side of Water street, at the northwest corner of said lot numbered twenty-seven (27), and running thence westerly with the south line of said last mentioned lot, fifty-six (56) feet; thence southerly by and with the west side of a tail race as now existing, one hundred and twenty-eight (128) feet and three (3) inches to the wharf line of the Potomac river and continuing the same course onward to the middle of the channel of said river; thence by and with the middle of the channel to a point which will be intersected by the east line of said lot numbered twenty-seven (27) protracted to said middle of the channel, and thence by and with the said last mentioned line reversed to the place of beginning, through, over and upon which land and premises at the time of the committing of said grievances by the defendant there was flowing a stream of water, which, but for the committing of said grievances by the defendant, could and would have been used as a source of water power of great force, to wit, of the force of one hundred (100) horse power, and which said land and premises were at the time aforesaid of great value to wit, of the value of forty thousand

5 dollars ($40,000.00) (including the value of said water power) and had a great annual rental, to wit, an annual rental value of four thousand dollars ($4,000.00*0*) (including the rental value of said water power) yet the defendant well knowing the premises, but contriving and wrongfully and injuriously intending to injure the plaintiffs and to deprive them of the use, benefit and enjoyment of said premises, and appurtenances, and particularly of said water power, heretofore, to wit, on the 15th day of January, 1899, wrongfully and injuriously entered upon said land and premises of the plaintiffs and wrongfully and injuriously and by means of a certain covered ditch or pipe, constructed by the defendant from a point near the

northern line of said premises of the plaintiffs and thence for a distance of, to wit, twenty-five feet through the said land of the plaintiffs to the adjoining premises on the west and thence to the Potomac river, diverted and ever since said last mentioned date has continued to so divert all of said stream of water from said land and premises of the plaintiffs, into and through said ditch or pipe constructed by the defendant as aforesaid, to the Potomac river, in consequence of which said wrongful and injurious diversion of said stream, as aforesaid, said water power ever since said 15th day of January, 1899, has been entirely taken away from the said land and premises of the plaintiffs—whereby and by reason of said wrongful and injurious acts of the defendant the plaintiffs ever since said last mentioned date have been deprived of any benefit, use or enjoyment of or from a large portion of their said land and premises and from using or leasing to others said water power or said land
6 with said water power thereon, from all which effects of the said wrongful acts of the defendant, the value and the annual rental value of said land and premises ever since said last mentioned date have been greatly depreciated and the value for use or leasing of the said water power, and for use or leasing of said land and premises with said water power thereon have been entirely destroyed to the damage of the plaintiffs in the sum of ten thousand dollars ($10,000.00), wherefore they bring their suit.

And the plaintiffs claim ten thousand dollars ($10,000.00), besides costs of suit.

3. For that at the time of the committing of the grievances hereinafter mentioned, to wit, from the 23rd day of November, 1896, to the present time, the plaintiffs were lawfully seized and possessed of a certain tract of land known and distinguished upon the public plats and plans of the former city of Georgetown, in the District of Columbia, as and being lots twenty-seven (27), twenty-eight (28), and part of lot twenty-nine (29) of the "Water lots," so-called, the same being described in one parcel as follows: Beginning at a point on the south side of Water street, at the northwest corner of said lot numbered twenty-seven (27), and running thence westerly with the south line of said last mentioned lot, fifty-six (56) feet; thence due west, twenty-two (22) feet and six (6) inches; thence southerly by and with the west side of a tail race as now existing, one hundred and twenty-eight (128) feet and three (3) inches to the wharf line of
7 the Potomac river and continuing the same course onward to the middle of the channel of said river; thence by and with the middle of the channel to a point which will be intersected by the east line of said lot numbered twenty-seven (27) protracted to said middle of the channel and thence by and with the said last mentioned line reversed to the place of beginning, whereon was a wharf or dock theretofore built by the plaintiffs in order that access by water might be had to said land and premises, through, over and upon which land and premises at the time of the committing of said grievances by the defendant there was flowing a stream of water, which, but for the committing of said grievances by the defendant,

could and would have been used as a source of water power of great force, to wit, of the force of one hundred (100) horse power, and which said land and premises were at the time aforesaid of great value, to wit, of the value of forty thousand dollars ($40,000.00) (including the value of said water power) and had a great annual rental value, to wit, an annual rental value of four thousand dollars ($4,000.00) (including the rental value of said water power) yet the defendant well knowing the premises, but contriving and wrongfully and injuriously intending to injure the plaintiffs and to deprive them of the use, benefit and enjoyment of said premises, and appurtenances, and particularly of said water power, heretofore to wit, on the 23rd day of November, 1896, and thence to the 15th day of January, 1899, wrongfully and injuriously kept and maintained a certain public sewer having an outlet at or near the northern line of said premises, and by means of said sewer the said defendant continuously from, to
8 wit, the 23rd day of November, 1896, until, to wit, the 15th day of January, 1899, wrongfully and injuriously discharged into said stream and over and upon said land of the plaintiffs large quantities of sewage, night soil and other filth, and heretofore, to wit, on said last mentioned date wrongfully entered upon said land and premises of the plaintiffs and wrongfully and injuriously and by means of a certain covered ditch or pipe, constructed by the defendant from a point near the northern line of said premises of the plaintiffs and thence for a distance of, to wit, twenty-five feet through the said land of the plaintiffs to the adjoining premises on the west and thence to the Potomac river, diverted and ever since said last mentioned date has continued to so divert all of said stream of water from said land and premises of the plaintiffs, into and through said ditch or pipe, constructed by the defendant as aforesaid, to the Potomac river, in consequence of which said wrongful and injurious diversion of said stream, as aforesaid, said water power was thereby entirely destroyed and taken away from the said land and premises of the plaintiffs whereby and by reason of all said wrongful and injurious acts of the defendant large quantities of earth, sewage, filth, sand and other sol-d material were deposited in the Potomac river immediately in front of and adjacent to the plaintiff's said wharf, between, to wit, the 23rd day of November, 1896, and to wit, the 15th day of January, 1899, so as to injuriously interfere with access to said wharf and premises by water, and whereby also during said last mentioned period offensive, and ill-smelling gases emanating from said sewer and from the matter
9 discharged therefrom, as aforesaid, were carried to, on and over the plaintiffs' said land and premises, and whereby also the plaintiffs from the 23rd day of November, 1896, and thence hitherto were deprived of any benefit, use or enjoyment of or from a large portion of their said land and premises and from using or leasing to others said water power, or said land with said water power thereon, and whereby also from the 15th day of January, 1899, until the present time the plaintiffs were deprived, not only of the use and benefit of said water power and said land and premises with said

water power thereon, as aforesaid, and from leasing to others said water power or said land with said water power thereon, as aforesaid, but also of the use and benefit for leasing or any other purpose of said stream flowing over, upon and across said land and premises of the plaintiffs, as aforesaid, in consequence of which said several wrongful acts of the defendant, during the entire period aforesaid, to wit, from the 23rd day of November, 1896, to the present time, the value and the annual rental value of said land and premises were greatly depreciated and the value for use or leasing of the said water power and for use or leasing of said premises with said water power thereon, and the value for use, leasing, or any other purpose of said stream flowing over and upon the plaintiffs' said land and premises, as aforesaid, and for use or leasing of said premises with said stream thereon, as aforesaid, were entirely destroyed to the damage of the plaintiffs in the sum of ten thousand dollars ($10,000) wherefore they bring their suit.

And the plaintiffs claim ten thousand dollars ($10,000.00) besides costs of suit.

A. S. WORTHINGTON,
Attorney for Plaintiff-

10 The defendant is to plead hereto on or before the twentieth day, exclusive of Sundays and legal holidays, occurring after the day of service hereof; otherwise judgment.

A. S. WORTHINGTON,
Att'y for Plaintiffs.

Defendant's Pleas.

Filed January 28, 1901.

In the Supreme Court of the District of Columbia.

CHARLES B. CROPLEY, GEORGE G. BOTELER, and John D. G. Crampton, Plaintiffs,
vs.
DISTRICT OF COLUMBIA, Defendant.
} No. 44419. Law.

Now comes the defendant, by its attorneys, and for plea to the plaintiffs' declaration and each count thereof, says that it is not guilty as alleged.

And for further plea to the first and third counts of said declaration, the defendant says that the several supposed causes of action in said counts in the plaintiffs' declaration set forth did not, nor did any of them, accrue to the plaintiffs within three years next before the institution of suit herein.

A. B. DUVALL,
C. A. BRANDENBURG,
Attorneys for Defendant.

11 *Replication.*

Filed February 12, 1901.

In the Supreme Court of the District of Columbia.

CHARLES B. CROPLEY, GEORGE G. BOTELER, and John D. G. Crampton, Plaintiffs,
vs.
THE DISTRICT OF COLUMBIA, Defendant.
} At Law. No. 44419.

The plaintiffs join issue upon the defendant's first and second pleas.

A. S. WORTHINGTON,
Attorney for Plaintiffs.

Memoranda.

October 28, 1902.—Verdict for defendant on 1st. and 3d. counts and for plaintiff on 2d. count for one cent damages.
October 31, 1902.—Motion in arrest of judgment, filed.

12 Supreme Court of the District of Columbia.

FRIDAY, *November* 21*st*, 1902.

Session resumed pursuant to adjournment, Hon. H. M. Clabaugh, justice, presiding.

* * * * * * *

CHARLES B. CROPLEY, GEORGE G. BOTELER, and John D. G. Crampton, Plaintiffs,
vs.
THE DISTRICT OF COLUMBIA, Defendant.
} Law. No. 44419.

It appearing that the motion in arrest of judgment filed herein, has not been presented within the time prescribed by rule of court. It is ordered that the same be, and it is hereby overruled and judgment on verdict awarded. Therefore it is considered and adjudged that on the first and third counts of the declaration herein, the defendant go thereof without day, and be for nothing held; that said defendant recover its costs of defense thereto, and have execution thereof as taxed by the clerk. Further, it is considered and adjudged that the plaintiffs herein recover of the said defendant, on the second count of the declaration herein, one cent, damages as aforesaid assessed by reason of the premises, but without costs.

13 *Notice of Appeal, &c.*

Filed December 13, 1902.

In the Supreme Court of the District of Columbia.

CHARLES B. CROPLEY ET AL.
vs.
THE DISTRICT OF COLUMBIA. } At Law. No. 44419.

The defendant, The District of Columbia, hereby appeals to the Court of Appeals D. C., from the judgment entered herein against it on the second count of the plaintiffs' declaration filed in the above-entitled cause, and from the judgment entered herein overruling its motion in arrest of judgment; and the clerk will please issue citation against the plaintiffs herein, Charles B. Cropley, George G. Boteler, and John D. G. Crampton.

A. B. DUVALL,
E. H. THOMAS,
Attorneys for the District of Columbia.

14 In the Supreme Court of the District of Columbia.

CHARLES B. CROPLEY ET AL.
vs.
THE DISTRICT OF COLUMBIA. } At Law. No. 44419. In Equity.

The President of the United States to Charles B. Cropley, George G. Boteler, and John D. G. Crampton, Greeting:

You are hereby cited and admonished to be and appear at a Court of Appeals of the District of Columbia, upon the docketing the cause therein, under and as directed by the rules of said court, pursuant to an appeal filed in the supreme court of the District of Columbia, on the 13th day of December, 1902, wherein The District of Columbia, is appellant and you are appellees, to show cause, if any there be, why the judgment rendered against the said appellant, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Seal Supreme Court of the District of Columbia.

Witness the Honorable Edward F. Bingham, chief justice of the supreme court of the District of Columbia, this 13th day of December, in the year of our Lord one thousand nine hundred and two.

JOHN R. YOUNG, *Clerk.*

Service of the above citation accepted this 15th day of December, 1902.

CHARLES L. FRAILEY,
Of Counsel for Appellee.

15 *Order for Appeal, &c.*

Filed December 15, 1902.

In the Supreme Court of the District of Columbia, the 15 Day of December, 1902.

CROPLEY & BOTELER
vs.
DISTRICT OF COLUMBIA. } At Law. No. 44419.

The clerk of said court will please note an appeal to the Court of Appeals in the above cause upon the judgment on all the counts, and issue citation.

A. S. WORTHINGTON,
C. L. FRAILEY,
Attorneys for Plaintiff- (*Appellants*).

16 In the Supreme Court of the District of Columbia.

CHARLES B. CROPLEY, GEORGE G. BOTELER, and John D. G. Crampton
vs.
THE DISTRICT OF COLUMBIA. } At Law. No. 44419.

The President of the United States to the District of Columbia, Greeting:

You are hereby cited and admonished to be and appear at a Court of Appeals of the District of Columbia, upon the docketing the cause therein, under and as directed by the rules of said court, pursuant to an appeal noted in the clerk's office — the supreme court of the District of Columbia, on the 15th day of December, 1902, wherein Charles B. Cropley, George G. Boteler and John D. G. Crampton are appellants, and you are appellee, to show cause, if any there be, why the judgment rendered against the said appellant- should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Seal Supreme Court of the District of Columbia.

Witness the Honorable Edward F. Bingham, chief justice of the supreme court of the District of Columbia, this 15th day of December in the year of our Lord one thousand nine hundred and two.

J. R. YOUNG, *Clerk*,
By W. E. WILLIAMS, *Ass't Clerk*.

Service of the above citation accepted this 17th day of Dec., 1902.

E. H. THOMAS,
Of Counsel, Attorney for Appellee.

17 *Memoranda.*

December 15, 1902.—Pl't'ffs' bond on appeal—filed.

December 17, 1902.—Time to submit bill of exceptions & October term of court extended 30 days to settle and time to file transcript of record extended 40 days.

December 29, 1902.—Order of December 17, made applicable to defendant.

January 30, 1903.—Time to settle exceptions extended 20 days and to file transcript 40 days.

February 20, 1903.—Time to present bill of exceptions extended to March 15, 1903, and to file transcript of record to March 30, 1903.

18 Supreme Court of the District of Columbia.

FRIDAY, *March* 13, 1903.

Session resumed pursuant to adjournment, Hon. H. M. Clabaugh, justice, presiding.

* * * * * * *

CHARLES B. CROPLEY ET AL., Plaintiffs,
vs.
THE DISTRICT OF COLUMBIA, Defendants. } No. 44419. At Law.

Comes now the attorneys and present to the court the bill of exceptions taken during the trial of this cause, and pray that the same may be signed and made of record now for then, which is accordingly done.

19 *Bill of Exceptions.*

Filed March 14, 1903.

In the Supreme Court of the District of Columbia.

CHARLES B. CROPLEY, GEORGE G. BOTELER, John D. G. Crampton, Plaintiffs,
vs.
THE DISTRICT OF COLUMBIA, Defendant. } At Law. No. 44419.

Be it remembered that at the trial of the issues joined in the above entitled cause before the Honorable Harry M. Clabaugh, an associate justice of the supreme court of the District of Columbia, and a jury regularly impanelled and sworn to try the issues joined between the plaintiffs and the said District of Columbia, the plaintiffs offered in evidence a certain section 3 of an act of Congress, approved March 3rd, 1891, which is in the words and figures following:

"SEC. 3. That the Commissioners of the District of Columbia be, and they are hereby, authorized and empowered to sell to the highest

bidder, at public auction, the following named property belonging to the said District of Columbia in Washington city: Lot three, square three hundred and eighty-two; part of lot three, square four hundred and ninety; and also the following-named property in the city of Georgetown belonging to said District: Fish-wharf on square six;
20 part of lots forty-seven, forty-eight, and forty-nine in square thirty; and part of lot two hundred and forty-five in square ninety-nine: *Provided*, That if, in the opinion of said Commissioners, the highest bid made at said sale for any or all of said lots is not a full and fair price for the same, the said Commissioners shall have the right to reject such bid or bids and annul said sale or sales; and that the proceeds of the sale of the said lots situate in Washington shall be applied to the erection and furnishing of two new police-station houses in Washington; and the proceeds of the sale of the said lots situate in Georgetown, or so much thereof as may be necessary, shall be applied to the purchase of a lot and the erection and furnishing of a new engine-house for engine company number five of the District of Columbia fire department, at present located in said city of Georgetown."

And also section 3 of a certain other act of Congress, approved April 1st, 1892, which is in the words and figures following:—

"SEC. 3. That the Commissioners of the District of Columbia, be, and they are hereby, authorized and empowered to sell and convey, to the highest bidder at public auction, the following-named property belonging to the said District of Columbia in Washington city: Lot three, square three hundred and eighty-two, part of lot three, square four hundred and ninety, and parts of lots one and seventeen in square three hundred and seventy-two; and also the following-named property in the city of Georgetown belong-
21 ing to said District: Fish-wharf on square six, part of lots forty-seven, forty-eight, and forty-nine in square thirty, and part of lot two hundred and forty-five in square ninety-nine: *Provided*, That if, in the opinion of said Commissioners, the highest bid made at said sale for any or all of said lots is not a full and fair price for the same, the said Commissioners shall have the right to reject such bid or bids and annul said sale or sales; and that the proceeds of the sale of the said lots situate in Washington shall be applied to the purchase of lots and the erection and furnishing of two or more new police station houses in Washington; and the proceeds of the sale of the said lots situate in Georgetown, or so much thereof as may be necessary, shall be applied to the purchase of a lot and the erection and furnishing of a new engine-house for engine company number five of the District of Columbia fire department, at present located in said city of Georgetown."

Thereupon the plaintiffs offered in evidence the following deed, omitting the covenants thereof on objection by the defendant's counsel that the Commissioners of the District had no power to bind the District by such covenants.

Thereupon the plaintiffs offered further evidence tending to prove that the property, the sale of which was authorized by said acts of

Congress, was commonly known as the "fish-wharf property;" that it was situated in Georgetown, in the District of Columbia, on the Potomac river, and between that river and the south side of Water street; that soon after the last mentioned act of Congress became a law, said fish wharf property was sold by the Commissioners of the District of Columbia at public auction; that the plaintiffs in
22 this case were the purchasers at such sale, and that after the sale, and in pursuance thereof, the Commissioners of the District of Columbia for the time being executed and delivered to the plaintiffs a deed of conveyance of said property to which deed was attached a certain plat, which was part thereof, said deed and plat being in the words and figures following:—

This indenture made this twelfth day of January in the year of Christ, one thousand eight hundred and eighty-five, by and between the "*District of Columbia*," a municipal corporation duly created and existing under and by virtue of the laws of the United States, of the first part, and *Charles B. Cropley, George G. Boteler* and *John D. G. Crampton* of Georgetown, in the said District of Columbia, of the second part;

Witnesseth, whereas the duly appointed Commissioners of the said District of Columbia, in strict accordance with the authority conferred upon them in and by the third section of the act of Congress, approved March 3rd, 1881, as amended by another act of Congress approved April 1, 1882, (the same being found in the United States Statutes at Large, volume 21, folio 467, and volume 22, folio 38) after due advertisement, did on the sixth day of January A. D. 1885, sell the property hereinafter mentioned and described, at public auction, to the said parties of the second part, for the sum of sixteen hundred and ninety-five dollars, ($1,695), said parties of the second part being the highest bidders therefor, and said sum being the largest sum of money offered for said property at said sale;

23 And whereas the said parties of the second part have complied with the terms of sale for the purchase of the property hereinafter named, paid the said purchase money in full, and are now entitled to a conveyance of said premises so sold;

Now, therefore, this indenture further witnesseth, that the said party of the first part, for and in consideration of the said sum of sixteen hundred and ninety-five dollars ($1,695) to it in hand paid by said parties of the second part, (the receipt of which is hereby acknowledged, before the ensealing and delivery of these presents), has granted, bargained, sold, aliened, enfeoffed, confirmed and conveyed, and does by these presents, grant, bargain, sell, alien, enfeoff, release, confirm and convey unto the said parties of the second part, their heirs and assigns forever, as tenants in common and not as joint tenants, the following described real estate, situate in that part of the District of Columbia formerly called Georgetown, to wit: all those certain pieces or parcels of land and premises known and distinguished upon the public plats and plans of said Georgetown as and being lots twenty seven (27), twenty eight (28), and part of lot twenty nine (29), of the "Water lots" so called, the same being described in one parcel as follows, that is to say:

(Beginning at a point on the south side of Water street, at the northeast corner of said lot numbered twenty seven (27), and running thence westerly with the south line of Water street, eighty one (81) feet, six (6) inches to the northwest corner of said lot numbered twenty eight (28); thence southerly with the west line of said last mentioned lot, fifty six (56) feet; thence due west, twenty two (22) feet and six (6) inches; thence southerly by and with the west side of a tail race as now existing, one hundred and twenty eight (128) feet and three (3) inches to the wharf line of the Potomac river and continuing the same course onward to the middle of the channel of said river; thence by and with the middle of the channel, to a point which will be intersected by the east line of said lot numbered twenty seven (27) protracted to said middle of the channel, and thence by and with said last mentioned line reversed to the place of beginning), the same as to the part between the said Water street and the wharf line being delineated upon a plat thereof, hereto annexed and made a part hereof, said property being formerly called and known as the "fish wharf" property, and extending from Water street to the channel of the Potomac river in said city of Georgetown in said District;

Together with all the improvements, ways, waters, easements, rights, privileges, appurtenances and hereditaments to the same belonging or in anywise appertaining, and all the remainders, reversions, rents, issues and profits thereof, and all the estate, right, title, interest, claim and demand whatsoever, both legal and equitable, of the said party of the first part, of, in, to or out of the said described pieces or parcels of land and premises;

To have and to hold the said pieces or parcels of land and premises with the appurtenances hereinbefore described, unto
25 the said parties of the second part, their heirs and assigns, as tenants in common and not as joint tenants, to their sole use, benefit and behoof forever.

And the said party of the first part, for itself and for its successors and assigns, hereby covenants, promises and agrees to and with the said parties of the second part, their heirs and assigns, that it, the said party of the first part, and its successors shall and will warrant and defend the said pieces or parcels of land and premises with the appurtenances hereinbefore described unto the said parties of the second part, their heirs and assigns forever, from and against the claims of all persons claiming or to claim the same or any part thereof, by, from, under or through it or its successors:

And further, that it, the said party of the first part and its successors, shall and will at any and all times hereafter, upon the request and at the cost of the said parties of the second part, their heirs or assigns, make, execute, acknowledge and deliver all such further deed or deeds, or other assurances in law for the more certain and effectual conveyance of the said pieces or parcels of land and premises, with the appurtenances hereinbefore described unto the said parties of the second part, their heirs or assigns as the said parties of the second part, their heirs or assigns or their counsel shall advise, devise or require.

In testimony of all which the said party hereto of the first part has caused these presents to be signed by James B. Edmonds, Joseph R. West and Garrett J. Lydecker, Commissioners of the said District of Columbia, duly appointed and qualified, (and who are
26 duly authorized by the acts of Congress aforesaid, to sell and convey said property hereinbefore described), and its corporate seal to be hereto affixed on the day and year first hereinbefore written.

J. B. EDMONDS,
J. R. WEST,
G. J. LYDECKER,
Maj. Engnr., U. S. A.,
Commissioners of the "District of Columbia."

Witness:
WILLIAM TINDALL.

DISTRICT OF COLUMBIA, }
County of Washington, } *ss:*

I, William Tindall, a notary public in and for the District and county aforesaid, do hereby certify that *James B. Edmonds, Joseph R. West* and *Garrett J. Lydecker*, whose official signatures appear to a certain deed bearing date on the 12th day of January, A. D. 1885, and hereunto annexed, personally appeared before me, in the District aforesaid, the said *James B. Edmonds, Joseph R. West* and *Garrett J. Lydecker* being personally well known to me to be the persons named in and who executed the said deed of the District of Columbia as Commissioners of the District, acting for and on behalf of said District, and acknowledged the same to be their act and deed, and the act and deed of the "*District of Columbia;*" and declared that the seal of the said District of Columbia was thereto affixed by due authority of law.

27 Given under my hand and notarial seal this twelfth day of January, A. D. 1885.

WILLIAM TINDALL,
Notary Public.

The deed was endorsed as follows:
Deed. District of Columbia to Charles B. Cropley, George G. Boteler, John D. G. Crampton, fish wharf property. 10.40 a. m. Received for record March 28, 1885, and recorded in Liber 1120, folio 13 *et seq.* one of the land records for the District of Columbia and examined by Geo. F. Schayer, dep. recorder.

28 The plaintiffs further gave evidence tending to prove that the consideration specified in said deed was to the amount for which they purchased said property; that they paid for the same before the said deed was delivered; that shortly before the plaintiffs made the purchase, George G. Boteler, one of the plaintiffs, went upon the property and observed that there was water flowing through

the tail race shown on said plat. The witness Boteler testified that when he went on the plaintiffs' property to look it over prior to the purchase of it, he had no knowledge of a sewer there; that when Boteler went to look at this property the sewer passed under the canal here (indicating on the plat) and through here; that you could not observe the sewer here (indicating) you could not observe it because it was 15 feet, 15 feet down perhaps and covered; that it was an open sewer running under Herr's mill.

The witness stated that "I will say now that I have been down through the mill and seen the sewer since then;" that the sewer water and all came through here (indicating); that the tail race was perhaps ten feet below the surface and that Water street was arched over; that on the south side of Water street the tail-race was perhaps five feet deeper than it was at the mouth of the river where this water empties into the river because there was a fall from Water street to the river, and that the tail race was of a uniform width of 22 feet at that time; that when Boteler went to look at the property he did not look into Herr's mill or Cissell's mill, and that he had lived in Georgetown prior to this visit to the property perhaps 7 years; that Mr. Crampton had lived there two years less than that time and that Mr. Cropley had lived there all his life; that
29 neither Cropley nor Boteler attended the sale and that none of the firm were at the sale; that shortly after said purchase the following letter was written by the persons whose names are signed thereto, to the Commissioners of the District of Columbia; and that soon after receiving said letter, said Commissioners replied in writing—their letter having been lost—that they could not comply with the request contained in said letter to them at that time because there was no appropriation applicable to the purpose.

WEST WASHINGTON, D. C., *April* 24, 1885.

The Hon. Commissioners of the District.

GENTLEMEN: We, the undersigned owners of lot 29 of the Water lots situated on the south side of Water street, in Georgetown or West Washington, D. C., propose improving said lots which is impossible so long as the Government sewer remains open on the property. We therefore request you to have the sewer covered to the point where it empties in the river at as early date as possible so that we can fill over and build on it.

We are yours respt.,

G. W. CISSELL.
CROPLEY, BOTELER & CRAMPTON.

The plaintiff further gave evidence which tended to prove that north of Water street and west of Potomac street there are two mills, one used by the Washington Ice Manufacturing Company and the other being George W. Cissell's mill, which at the time said purchase was made and for more than
30 twenty-two years prior thereto had been supplied with water power from the Chesapeake and Ohio canal by means of

flumes which entered the second stories of said mills, and that underneath the same, passing previously under the Chesapeake and Ohio canal and then through Grace street under the mills hereinbefore mentioned, and under Water street under the office of George W. Cissell, immediately to the north and adjoining the tail-race on the property of the plaintiffs then out into the Potomac river, there had always flowed, during said period, the main sewer of Georgetown. This sewer continuously from and since the year 1852 until carried around through Potomac street by arched underground construction as hereinafter set forth, was opened and uncovered after leaving said canal until it reached the north side of Water street and after leaving the south side of Water street, it remained open and uncovered until it emptied into the Potomac river. That the water from the canal which entered the North mill, after discharging itself over the wheel of the mill entered into the open sewer and mingled with its waters, and that the water which supplied the South mill likewise after moving the water wheel of that mill emptied in the sewer and mingled its waters therewith, and that the said sewer with the said commingling of waters continued open to the north line of Water street and the said mingled waters flowed as aforesaid through the said tail race to the Potomac river; that several years prior to 1898 another mill known as the Hill mill was erected on Water street; that from that time said Hill mill was supplied with an independent flow of water from said canal which furnished the motive power for the running of
31 that mill; that at that time under a verbal arrangement made between Major Hall the owner of said Hill mill and the plaintiffs an underground pipe was constructed which carried said water after it left the wheel of said Hill mill under said Water street and through and under the northern part of said fish wharf property to said tail-race at a point near the north end of said tail race; and that by means thereof the water which ran said Hill mill flowed into and was added to the water in said tail race, which came from said other mills. Said Hill died on November 25th, 1899. The plaintiff further gave evidence which tended to prove that during the said period of time that the sewer ran under Water street, Water street was arched over and always arched over. Evidence was further given of the charter and ordinances of Georgetown as follows:

Resolved, by the board of aldermen and board of common council of the corporation of Georgetown, That the arch over the market house run on Water street be immediately extended to the northern line of said street according to an act of condemnation in the year 1809, and that the curb stones over said arch be set in corresponding proper position to conform to the line of said condemnation, making the usual allowance for foot pavement, and that the street be repaved, all to be executed under the direction of the mayor and to aid in the accomplishment of which the sum of fifty dollars is hereby appropriated to be paid by the clerk of the corpora-

tion to the order of the mayor out of the first unappropriated money that shall come into the treasury of the town.

Approved October 23, 1846.

32 Resolved, by the board of aldermen and board of common council of the corporation of Georgetown, That the mayor be and he is hereby authorized to have the arch on Water street, near the mill of Messrs. Ray, put in thorough repair, and when the work hereby authorized is done, render a bill of the same to this corporation.

Approved March 24, 1855.

Resolved by the board of aldermen and board of common council of the corporation of Georgetown, That the mayor be and he is hereby authorized to employ a suitable person to repair the arch under Water street at Ray's mill so that the same may be completed during the ensuing week, and while the water is out of the canal, and the clerk of the corporation is hereby directed to pay the expense of the same upon the order of the mayor, provided the same does not exceed thirty dollars, which sum, or so much thereof as is necessary, is hereby appropriated.

Approved 21st Feb. 1857.

The act of Congress amending the charter of Georgetown approved March 3, 1905, contained an enumeration of powers granted to the corporation. Section 12 provides:

"That the said corporation shall have power * * * to open extend and regulate streets within the limits of the said town * * *

The last power given in said section is;

"To make and keep in repair all necessary sewers and drains, and to pass regulations necessary for the preservation of the same."

33 The evidence further showed that when the plaintiffs purchased said fish wharf property the sewage of the greater part of Georgetown reached the Potomac river through said tail-race, the drainage into the sewer which emptied into said tail race being then mainly surface drainage, but partly composed of drainage through under-ground sewers such as are found in other cities; that thereafter as the city of Georgetown increased in population two new sewers were laid and the quantity of sewage flowing into and through the said tail-race increased from time to time from this cause, so that in the year 1898 and afterwards the amount of sewage flowing through said tail race was much greater than it had been when the property was purchased by the plaintiffs; that during the period of three years immediately preceding the bringing of this suit great quantities of fecal matter and other offensive substances, the usual contents of city sewers, were discharged into and through said tail race by means of said sewers; and that the quantity of such offensive matter was particularly large after heavy rains.

That on or about the middle of January, 1899, certain persons, acting under the authority of the Commissioners of the District of Columbia, without obtaining or asking for the consent of the plaintiffs, or any of them, and without their knowledge entered upon said property of the plaintiffs and diverted therefrom all the water

flowing through said tail race, including the water flowing as aforesaid from said Hill mill, and that this diversion was by means of a large pipe, or sewer construction as hereinafter mentioned,
34 which was connected with the northern end of said tail race, and arched over at that point, and which extended through the land adjoining that of the plaintiffs on the west to the Potomac river, so that thereafter and down to the time of this trial no water whatever flowed into the said tail race.

It further appeared from the evidence that there was a construction or change of the course of the sewer from running under the mills above Water street to around through Potomac street which construction occupied about six or eight months. Most of it was of solid rock construction and it took them quite a while to make that change. Afterwards they erected the portion of the sewer west of the tail race on Cissel's land; and this said portion of the sewer on Cissel's land was done before they arched over that portion of the tail race on the plaintiff's land as hereinabove described.

Just prior to the diversion of the water from the tail race as before described, said sewer or new construction had been built on Cissel's land west of the tail race up to the line of the plaintiff's property on the west side. It had been built and stopped right there; and several days after the construction on the plaintiff's land by means of which the water was diverted as before mentioned, one of the plaintiffs discovered that the District had built a wall across plaintiff's property and that the water was passing out through the sewer constructed as before described on Cissel's land, west of the tail race.

The evidence further showed that the material for the con-
35 struction of the sewer on Cissel's land was landed at the plaintiff's wharf and most of it piled on plaintiff's property, between the warehouse and the mill race.

The evidence given to the jury further tended to show that within a day or two after the acts referred to in the next preceding paragraph the plaintiff, George B. Boteler, went to the office of the Commissioners of the District of Columbia, and there saw Captain Beach, who was then the Engineer Commissioner and as such was in charge of the sewers in the District of Columbia and under whose direction said work of diversion had been done, and was then and there told by said Beach that the Commissioners were doing that work and did not propose to ask any questions; that if the plaintiffs had any redress it was in the courts. At that time there was pending in the supreme court of the District of Columbia an action at law by the plaintiffs against the District of Columbia, which was brought on the 23rd day of November, 1896, in the declaration in which case it was charged among other things, as follows:—

"The plaintiffs sue the defendant, a municipal corporation, incorporated under the laws of the United States for that at the time of the committing of the grievances hereinafter mentioned, to wit, from the 12th day of January, A. D. 1885, till the present time, the plaintiffs, were lawfully seized and possessed of a certain tract of land

* * * over and upon which land and premises at the time of the committing of said grievances by the defendant there was flowing a stream of water which but for the committing of said
36 grievances by the defendant could and would have been used as a source of water power of great force, to wit, of the force of one hundred (100) horse power and which said land and premises were at the time aforesaid, of great value, to wit, of the value of $40,000.00 (including the value of said water power) and had a great annual rental value, to wit, an annual rental value of $4,000, (including the rental value of said water power), yet the defendant, well knowing the premises, but contriving and wrongfully and unjustly intending to injure the plaintiffs and to deprive them of the use, benefit and enjoyment of said premises and appurtenances, and particularly of said water power, heretofore, to wit, on the 13th day of January, 1885, and thence hitherto, wrongfully and injuriously kept and maintained a certain public sewer having an outlet north of the northern line of said premises, and by means of said sewer the said defendant continuously from said last mentioned date until the present time unlawfully, wrongfully and injuriously discharged into said stream and upon, over and across said land and premises of the plaintiffs large quantities of sewage, night soil and other filth, whereby the plaintiffs were deprived of any benefit, use or enjoyment from or of a large portion of their said premises, and from using or leasing to others said water power, or said land with said water power thereon."

The plaintiffs further gave evidence tending to prove that the water from said several mills flowing through said tail-race before it was so diverted was available for the purpose of furnishing water power as it passed through said tail-race, and that the exist-
37 ence of such water power on the premises added to the rental value of said property from $1100 to $1600 *hundred dollars* per annum, but that said water flowing through said mills could not be used for the purpose of furnishing water power and was made entirely valueless because sewage was mingled with it as aforesaid, because said sewage would clog the water wheel.

That the plaintiffs, George G. Boteler and Charles B. Cropley, during the three years immediately preceding the bringing of this suit, were engaged in business under the firm name of Cropley and Boteler ; that said firm during that period occupied said premises and paid to the plaintiffs in this case, rent therefor at the rate of $900 per annum ; that on said premises there was a large warehouse ; and that in said warehouse and upon said property they carried on the business of manufacturing and dealing in fertilizers.

That at all times during the three years immediately preceding the bringing of this suit there were offensive odors from the sewage matter in said tail race, which penetrated into the said warehouse and over all of said property ; that after heavy rains the offensive odors from this cause on said property were so offensive as to compel people who were near the same to go away, the stench being intolerable ; and that the prevalance of this stench during said period

of three years reduced the rental value of said premises during said period not less than $300 *hundred dollars* per annum.

Thereupon the plaintiff, GEORGE B. BOTELER, being upon the stand as a witness for the plaintiffs, in his direct examination, was asked by counsel for the plaintiffs the following question:

38 "Assuming that the tail race had been there as it was without the sewage, would the rental value of that property to Messrs. Cropley and Boteler have been greater than it was with the sewage there during the period, I mean, after January 1st, 1898?"

To this question the defendant by its counsel then and there objected on the ground that it called for a matter of opinion and also referred to the damages to the tenant and not the damages to the owner, and that there is no proof that the rent was actually diminished nor that any offer was ever made of any increased rent.

But the court sustained the objection and refused to allow the witness to answer the question, to which ruling of the court the plaintiffs by their counsel then and there duly excepted.

On cross-examination the witness stated that the firm of Cropley and Boteler were engaged in the sale and manufacture of fertilizer and stored it on the property adjacent to the tail race, dissolved rock and pure ground bone and other fertilizers, of which they sold from 1000 to 1200 tons a year. The witness was then asked regarding the smell from this material and testified that there was just such smell as would come from pure ground bone, acidulated.

Q. The same smell you would get from any fertilizer, that you would get from the commission house in the market?

A. No, sir; it would not be the same smell, for this reason; very many fertilizers such as Mr. Mann use green goods and we do not have any of that. We had no means of mixing and we had to use dry goods.

39 On re-direct examination the witness was asked why it was that this firm had to use dry goods in the fertilizing business and he replied "I had no means of mixing green goods, we use dry goods because we use a hand mixer."

Witness further testified that green goods—by which he meant the green bones from the butchers' shops—they had no way of grinding and had to buy finely ground bone to mix with other materials.

Thereupon the witness was asked by counsel for the plaintiffs whether it *was* would have made any difference in that respect if the firm had had the use of the water power on the premises. To this question counsel for the defendant then and there objected. But the court sustained the objection and refused to allow the witness to answer the question, to which ruling counsel for the plaintiffs then and there excepted.

Thereupon JOHN FITZ a witness on behalf of the plaintiffs stated that he was a manufacturer of water wheels and duly qualified himself to testify as an expert in matters relating to hydraulic machinery in general and to the means of using water power in particular. Witness gave evidence tending to show that in or about November, 1899, there was flowing through said tail race exclusive of water that came from the sewer the equivalent of fifty-nine hundred cubic feet of water per minute, which did not include the water from the Hill mill; that this power would have been sufficient to operate a forty horse power wheel; and that this power would have been
40 made valuable for manufacturing purposes on the premises, but for the sewer. Said Fitz further stated on his direct examination that he was familiar with the rental value of water horse power generally in the eastern part of the United States but not within 100 miles of Washington; that it varied from $50.00 to $75.00 per year per —, and was greater in the city than in the country; and that he knew the rental value of water horse power in the Potomac river. Thereupon the witness was asked by counsel for the plaintiffs the following question:—

"What is the rental value of water horse power per year per horse power in this vicinity?"

To this question counsel for the defendant objected. But the court sustained the objection because said witness did not pretend to know the value of water horse power in Georgetown, and refused to allow the witness to answer the question, to which ruling of the court counsel for the plaintiffs then and there duly excepted.

Thereupon JAMES A. CATON being upon the stand as a witness for the plaintiffs having testified that he had lived in Georgetown for about forty years and knew the property of the plaintiffs and that he had built within a few months after the purchase of the property the wharf on their place which is there now, was asked by the plaintiffs' counsel the following question:

"Have you any information Mr. Caton as to whether there was any effect from this sewer upon the height of the water in front of that property of Cropley and Boteler?"

To this question counsel for the defendant objected, on the
41 ground that this dredging was done long prior to the three year statutory period of limitations. Counsel for the plaintiffs offered to prove by the witness that prior to the period of three years immediately preceding the bringing of this suit he dredged out an obstruction which had formed immediately in front of and adjoining the wharf of the plaintiffs and that in doing the dredging the witness brought up various articles such as are ordinarily brought down by sewers in cities, and that after the bar had been removed by the witness it formed again by deposits brought down by the sewer; but the court sustained the objection and refused to allow the witness to answer the question, to which ruling of the court counsel for the plaintiffs then and there excepted. Said witness afterward testified that his dredging of said bar occurred shortly after

the plaintiffs had purchased said property, and after such dredging the sewer again formed the bar there.

One of the plaintiffs, BOTELER, while upon the stand, in this connection, testified that on the 27th day of February, 1899, said date being within three years prior to the bringing of this suit, he made soundings of the water in front of the plaintiff's wharf. That the effect of the sewage coming out of the tail race was that it decreased the depth of the water in front of this wharf, there being seven or eight feet less depth of water immediately in front of the sewer and thirty or forty feet below the mouth thereof than there was further out and below. The result of the witness's soundings was that the depth of the water ranged from seventeen and a half feet out some
42 little distance from the wharf and out in the river, to nine and a half feet right in front of the wharf. The said depth of nine and a half feet precluded the possibility of bringing close to the wharf of the plaintiff's vessel drawing more than said nine and a half feet.

Thereupon THOMAS W. SMITH being upon the stand as a witness for the plaintiffs on his direct examination testified that for a period of about nine or ten years preceding the time of the trial of this case he was the sole lessee or rather the owner of one of the manufacturing establishments hereinabove referred to lying between the property of the plaintiffs and the Chesapeake and Ohio canal, and supplied with water power from said canal; that said manufactory was formerly called the Pioneer mills and when under the witness's control was a place for manufacturing artificial ice; that until about 1898 or 1899, said water flowed under said mill and mixed with the water from the canal after it had passed his wheel; that at or about said last mentioned date on his complaint the District Commissioners diverted the sewer, so that thereafter the sewerage passed around his mill instead of under it, and increased the value of his property $10,000. Thereupon the witness was asked by counsel for the plaintiffs on re-direct examination the following question:—

"What effect would it have had upon the rental value of your property if when they removed the sewer they had taken the water power with it?"

To this question counsel for the defendant then and there objected. But the court sustained the objection, to which ruling counsel for the plaintiffs then and there excepted.

43 At the conclusion of the evidence counsel for the defendant moved to strike out all the testimony in the case concerning the value of the water power flowing through said tail race on plaintiff's premises, and particularly the testimony of a certain witness Pressey who testified that the rental value of the horse power flowing through said tail race found by means of measurements made in the new sewer on Cissell's land (which he testified gave the same result as though made in the tail race) which said measurements were made on days subsequent to the diversion of the water power from the

plaintiff's land through said new sewer or pipe, was $35.00 annually in Georgetown, and that there were from 36½ to 54 net horse power flowing through said tail race; and who testified also that at the time he made the said measurements there was and for some time had been, no rain, and that the amount of sewage flowing through said sewer was almost imperceptible; to the granting of which motion counsel for the plaintiffs objected. But the court overruled the objection and granted the motion, to which ruling of the court counsel for the plaintiffs then and there excepted.

Thereupon the court instructed the jury to bring in a verdict in favor of the defendant on the first count of the declaration; to the granting of this motion counsel for the plaintiffs objected, but the court overruled the objection and granted the motion, to which ruling counsel for the plaintiffs then and there duly excepted.

Thereupon counsel for the defendant moved the court to instruct the jury to find a verdict for the defendant upon the third
44 count of the declaration. To this motion counsel for the plaintiffs objected, but the court overruled the objection and granted the motion, to which ruling of the court counsel for the plaintiffs then and there excepted.

Thereupon the court instructed the jury to find a verdict for the plaintiffs on the second count of the declaration for nominal damages only. To so much of said instruction as directed the jury to find nominal damages only, counsel for the plaintiffs then and there duly excepted.

When said deed from the Commissioners of the District of Columbia to the plaintiffs was offered in evidence counsel for the District of Columbia then and there objected to the admission of said deed in evidence on the ground that the act of Congress authorized the Commissioners of the District of Columbia to sell and convey, and that the said deed is made by the District of Columbia, and that the said deed is not in the name of the grantors authorized to make it, but the court overruled the said objection, to which said ruling of the court the defendant then and there excepted.

At the close of the evidence counsel for the defendant moved the court to direct a verdict for the defendant on the whole declaration and on each count thereof separately, and thereupon the court ruled and directed a verdict for the defendant on the first and third counts of the declaration and for the plaintiffs for nominal damages on the second count thereof, and to the action of the court in direct-
45 ing a verdict for the plaintiffs for nominal damages on said second count, counsel for the defendant then and there excepted.

Each of the foregoing exceptions growing out of the proceedings in this case was taken by the plaintiffs and defendant at the time it appears to have been taken in the foregoing statement of the evidence and proceedings in the case, and was at the same time, and while the jury were at the bar of the court, and before they had retired to consider of their verdict, entered upon the minutes of the presiding justice and the plaintiffs and defendant pray the court to

sign this their bill of exceptions, which is done accordingly, this 13th day of March, 1903, now for then.

HARRY M. CLABAUGH, *Justice.*

46 *Instructions for Transcript.*

Filed March 17, 1903.

In the Supreme Court of the District of Columbia.

CROPLEY ET AL.
vs.
DISTRICT OF COLUMBIA. } No. 44419. Law.

The clerk will please prepare a transcript of record in the above entitled cause, and include therein the following proceedings:

1901, Jan. 8. Declaration &c., filed.
" " 28. Appearance of Duvall—plea—filed.
" Feb. 12. Joinder in issue—calendared.
1902, Oct. 28. Verdict for defendant on 1st and 3rd counts and for plaintiff on 2nd count.
" Oct. 31. Motion in arrest of judgment—filed.
" Nov. 21. Judgment for defendant against plaintiffs on 1st and 3rd counts for costs, and judgment for plaintiffs against defendant on 2nd count for one cent without costs.
" Dec. 13. Appeal by defendant to Court of Appeals.
" " " Citation issued.
" " 15. Appeal by plaintiffs to Court of Appeals.
" " " Citation issued.
" " " Plaintiff's bond filed.
" " 17. Time to submit exceptions extended and October term prolonged.
" " " Time to file transcript extended 40 days.
" " 29. Order of Dec. 17, 1902, extending term &c., made applicable to defendant.
1903, Jan. [10. Certificate of defendant's witnesses filed.] *

47

1903, Jan, 30. Time to settle exceptions extended to March 15th, 1903, and to file transcript extended to March 30th, 1903.
" Mar. 14. Bill of exceptions—filed.

CHARLES L. FRAILEY,
Of Counsel for Plaintiffs.

[* Words and figures enclosed in brackets erased in copy.]

48 Supreme Court of the District of Columbia.

UNITED STATES OF AMERICA,
District of Columbia, } ss:

I, John R. Young, clerk of the supreme court of the District of Columbia, hereby certify the foregoing pages, numbered from 1 to 47, inclusive, to be a true and correct transcript of the record, as per directions of counsel herein filed, copy of which is made part of this record, in cause No. 44419, at law, wherein Charles B. Cropley, *et al.* are plaintiffs, and The District of Columbia is defendant, as the same remains upon the files and of record in said court.

Seal Supreme Court of the District of Columbia.

In testimony whereof, I hereunto subscribe my name and affix the seal of said court, at the city of Washington, in said District, this 24 day of March, A. D. 1903.

JOHN R. YOUNG, *Clerk.*

Endorsed on cover: District of Columbia supreme court. No. 1291. The District of Columbia, appellant, *vs.* Charles B. Cropley *et al.* No. 1292. Charles B. Cropley *et al.*, appellants, *vs.* The District of Columbia. Court of Appeals, District of Columbia. Filed Mar. 25, 1903. Robert Willett, clerk.

Court of Appeals of the District of Columbia.

October Term, 1903.

No. 1291.

THE DISTRICT OF COLUMBIA, APPELLANT,

vs.

CHARLES B. CROPLEY, GEORGE G. BOTELER, AND JOHN D. G. CRAMPTON.

No. 1292.

CHARLES B. CROPLEY, GEORGE G. BOTELER, AND JOHN D. G. CRAMPTON, APPELLANTS,

vs.

THE DISTRICT OF COLUMBIA.

BRIEF FOR THE DISTRICT OF COLUMBIA.

A. B. DUVALL,
E. H. THOMAS,
Attorneys for District of Columbia.

Press of Washington Monotype Printing Co.

Court of Appeals of the District of Columbia.

OCTOBER TERM, 1903.

No. 1291.

THE DISTRICT OF COLUMBIA, APPELLANT,

vs.

CHARLES B. CROPLEY, ET AL.

No. 1292.

CHARLES B. CROPLEY, ET AL., APPELLANTS,

vs.

THE DISTRICT OF COLUMBIA.

BRIEF AND ARGUMENT FOR THE DISTRICT OF COLUMBIA.

STATEMENT OF THE CASE.

The plaintiffs below (Cropley *et al.*) acquired for a consideration of $1,695 by deed dated the 12th day of January, 1885, in which the District of Columbia is named as grantor, certain property in Georgetown therein described as lots 27, 28 and part of lot 29 of the "Water lots" so called. (See Deed Record, pp. 12, 13 and 14.)

This property was sold by virtue of the authority and direction of Congress under two acts, one approved March 3, 1881 (21 Stats. 467) and the other April 1, 1882 (22 Stats. 38), the only difference between these two acts of Congress being that by the former, the Commissioners of the District of Columbia were authorized to "sell" and by the latter to "sell and *convey*." The acts of Congress mentioned described the property in Georgetown to be sold and conveyed as "Fish-wharf on Square six, and part of lots forty-seven, forty-eight, and forty-nine in Square thirty." (Record, bottom p. 10, and p. 11. Note: These are distinct properties, Square 30 being in a different locality from Square 6. The date of the year of the approval of said acts is erroneously given on these pages of the Record.)

By comparison of the description in the deed (Record, pp. 12 and 13) with the description in the acts of Congress (Record, pp. 10 and 11), it will be seen that the descriptions of the property differs from the grant of authority. Again, the deed describes the property by metes and bounds, a method of description wholly outside that provided by Congress, and by these metes and bounds these lots were protracted to the middle of the channel of the Potomac River. The draftsman of this deed was, it will be seen, extremely liberal with the southern boundary line.

The question now arises whether the identity of the property authorized by Congress to be sold and conveyed and that actually conveyed is sufficiently established by the Bill of Exceptions. No record giving such identification was produced.

The Bill of Exceptions, however, states (Record, bottom p. 11 and top p. 12) that "the plaintiffs offered further evidence tending to prove that the property, the sale of which *was authorized by said acts of Congress*, was commonly known as the 'fish-wharf property;' that it was situated in Georgetown, in the District of Columbia, *on the Potomac River, and*

BETWEEN *that river and the south side of Water street.*" This is, we claim, a perfect description of property outside of any part of the Potomac River, and carefully establishes the fact that no part of the property authorized to be sold and conveyed was projected or protracted into the river or its channel, but this evidence also perfectly establishes a description of more than a "Fish-wharf on Square 6." Perhaps the possession of the land itself under this deed vests thereto in the plaintiffs except as to the bed of the tail-race, but, we submit, it conveys no more.

The plaintiffs as owners of this property on the 8th day of January, 1901, entered suit in the court below and filed their declaration (Record, p. 1) in three counts, asserting by the first count, that thereon "was a wharf or dock theretofore built by the plaintiffs in order that access by water might be had;" that upon said land "there was flowing a stream of water which, * * * could and would have been used as a source of water power," and that the District of Columbia "intending to injure the plaintiffs and to deprive them of the use * * * of said premises * * * and particularly said *water power*, * * * on the 23d day of November, 1896, and thence until * * * the 15th day of January, 1899, *wrongfully and injuriously* kept and maintained a certain public sewer * * * and by means of said sewer * * * *unlawfully, etc.*, discharged into said stream and over, upon and across said land and premises of the palintiffs large quantities of sewage * * * and whereby also large quantities of earth and sewage, * * * were deposited in the Potomac River immediately in front of and adjacent to plaintiffs' said wharf, so as to injuriously interfere with access to said wharf and premises by water, and whereby also offensive * * * gases, emanating from said sewer * * * were carried to, on and over the plaintiffs' said premises."

By the second count the plaintiffs declared the value and

use of this flowing stream as in the first count and averred that on the 15th day of January, 1899, the defendant "wrongfully and injuriously *entered upon said land* and premises of the plaintiffs and wrongfully and injuriously and by means of a certain covered ditch or pipe, by the defendant * * * *diverted* * * * all of said stream of water from said land and premises * * * in consequence of which * * * said water power ever since said 15th day of January, 1899, has been entirely taken away from said land and premises of the plaintiffs."

The third count in substance is a combination of the previous counts in the plaintiffs' declaration.

The defendant plead the general issue and the Statue of Limitations to this declaration, on which issue was joined. (Record, bottom p. 6 and top p. 7.) The result is, we claim, that for any supposed injuries or trespasses prior to the 8th day of January, 1898, the plaintiffs can in no event recover.

The trial in the court below resulted in a verdict for the defendant on the 1st and 3d counts of the declaration and a verdict in favor of the plaintiffs on the 2d count for one cent damages under the instruction of the court.

(Record p. 7 and bottom p. 23.)

We propose to review the evidence preserved by the Bill of Exceptions on the claims of the plaintiffs for injury to their wharf privilege, their complaint of the public sewer as polluting the stream running over their land, and the diversion thereof and consequent destruction of the alleged water power.

Wharf Rights of Plaintiffs.

As noted before, the plaintiffs offered no evidence to show that Congress ever authorized a conveyance of land to the middle of the channel of the Potomac River. The plaintiffs did offer evidence which tended to prove that this property was known as the "fish-wharf property" (Record top p. 12).

The opportunity of observation, notice and knowledge of plaintiffs respecting the character and continuance of this open sewer running over this land prior to their purchase of it clearly appears. With such notice they purchased and with that knowledge the Bill of Exceptions shows, that James A. Caton (Record, pp. 21 and 22) knew this property and within a few months after their purchase of it, built for them a wharf "which is there now." This witness testified "that his dredging of said bar occurred shortly after the plaintiffs had purchased said property, and after such dredging the sewer again formed the bar there." What the depth of the water in front of this wharf, whether increased or decreased within the period of three years before the suit or at any time between the bringing of the suit and the time of the trial, was nowhere proved or offered to be proved.

This being so, as we affirm, the question of the right of plaintiffs to a given depth of water in front of their wharf is not here involved beyond the applicability of the Statue of Limitations.

The Public Sewer.

The south line of Water street is some distance from the northern boundary of the tail-race on plaintiffs' lots and is there cut off from Water street by an interveninig strip of land owned by George W. Cissel and on which he had his office building.

The Bill of Exceptions states (Record, bottom p. 15) that the plaintiffs gave evidence which tended to prove that north of Water street and west of Potomac street there are two mills which, at the time of plaintiffs' purchase, were, and for for twenty-two years before, had been supplied with water power from the Chesapeake and Ohio Canal by means of flumes (Record, p. 16) which entered the second stories of said mills and after its use as power was discharged successively into the sewer beneath. This sewer, being the main sewer of

Georgetown, had continuously, from and since the year 1852, until diverted in January, 1899, passed under the Chesapeake and Ohio Canal, thence across Grace street under said mills and during this whole period was opened and uncovered after leaving the canal until it reached the north side of Water street.

Between 1852 and the time of trial, Water street was arched over, and this water-way or sewer ran under the arch in crossing this street towards its outlet in the Potomac River; but the sewer was uncovered and open both north and south of Water street. Before reaching the plaintiffs' land during this whole period, the waste water from mills had emptied into this open sewer and commingling with its sewer water, continued as an open sewer to the north line of Water street, then under Water street, then after leaving Water street over Cissel's land, and thence as an open sewer of such commingled waters, fed additionally by waste water for several years prior to 1898 from the Hill Mill situated across Water street on the east, over the plaintiffs' land to the Potomac River.

The extent with which the sewage of Georgetown had before the plaintiffs' purchased contaminated and rendered useless and illusory all claims of pure water power, appears in the record.

The Bill of Exceptions proceeds to state (Record, middle p. 17) that "the evidence further showed that when the plaintiffs' purchased said fish wharf property, the sewage of *the greater part of Georgetown* reached the Potomac River through the said tail-race, the drainage into the sewer which emptied into said tail-race being then mainly surface drainage, but partly composed of drainage through underground sewers such as are found in other cities (and) that thereafter as the City of Georgetown increased in population two new sewers were laid and the quantity of sewage flowing into and through the said tail-race increased from time to time from this cause, so that in the year 1898 and afterwards the amount of sewage

flowing through said tail-race was much greater than it had been when the property was purchased by the plaintiffs." Then follows a description of the usual sewage characteristics contained in the plaintiffs' sewer easement.

It would seem that the plaintiffs should applaud the action of the District in ridding them of this nuisance and indeed previous to this suit they had implored the District to afford them such relief. Shortly after said purchase (Record, middle p. 15) the plaintiffs and G. W. Cissel addressed the following letter to the Commissioners.

"WEST WASHINGTON, D. C., *April* 24, 1885.
"*The Hon. Commissioners of the District.*

"GENTLEMEN: We, the undersigned owners of lot 29 of the Water lots situated on the south side of Water street, in Gerogetown or West Washington, D. C., propose improving said lots, which is impossible so long as the Government sewer remains open on the property. We therefore request you to have the sewer covered to the point where it empties in the river at as early date as possible, so that we can fill over and build on it.

"We are yours respectfully.,
"G. W. CISSELL
"CROPLEY, BOTELER & CRAMPTON."

The Commissioners replied in writing "that they could not comply with the request contained in said letter to them at that time, because there was no appropriation applicable to the purpose." (Record, p. 15.)

Again, it is submitted, that when the plaintiffs bought land incumbered by the easement of a public sewer, the increase of sewage mentioned did not afford them a right of action. It was a continuing nuisance when they bought it, and the natural increase of its offensive qualities was contemplated in law.

Notwithstanding their purchase, with knowledge of the ewer, the plaintiffs', prior to 1898 (the time of the increaseds sewage because of the two new sewers), in November, 1896

(Record, pp. 18 and 19), entered suit against the District for the maintenance of this public sewer, and for thereby preventing them from using water power which would have existed but for the sewer. That is to say, they then entered suit and now sue for a water power *which would have existed* if it had not been destroyed in 1852, and which, independent of that, was and is based on the contingency of the use of the canal water by the mills mentioned. It will be observed that there is no evidence of the extent or amount of water running through the tail-race from land above it which existed or was derived other than from sewage water and waste water from the mills, except in November, 1899. (Record, top of p. 21.)

What quantity was canal water, what quantity was sewage water, and what quantity, if any, was pure water, is not otherwise shown. The plaintiffs' "gave evidence tending to prove that the water *from said several mills* flowing through said tail-race before it was diverted was available for the purpose of furnishing water power as it passed through said tail-race, and that the existence of *such water power* on the premises added to the rental of said property from $1,100 to $1,600 per annum, but that said *water flowing through said mills* could not be used for the purpose of furnishing water power and *was made entirely valuless* because sewage was mingled with it as aforesaid, because said sewage would clog the water wheel." (Record, middle p. 19.)

By what arrangement the Washington Ice Manufacturing Company's Mill and Cissel's Mill (Record, bottom p. 15) acquired water from the canal was not shown. If any easement for the benefit of plaintiffs' to use the waste water therefrom is claimed, or any easement to have such water alone flow over their land, it would seem, we believe, necessary to show the title or claim of water rights from the canal. These mills had been supplied for more than twenty-two years before plaintiffs' purchase in 1885 with water from the canal (Record, bottom p. 15), but this main sewer of Georgetown

had existed there "continuously from and since the year 1852," and thus existed prior to the use of the canal water by the mills, according to the record. Canal water never had, therefore, flowed uncontaminated over this land, and never could, by itself, have been used by the plaintiffs' as water power. It follows that, according to the plaintiffs' showing, such water power was non-existent and "was entirely valueless because sewage was mingled with it" (Record, near bottom p. 19), and on the facts the plaintiffs' were not entitled to recover. Again, this land was owned by plaintiffs' since 1852, depended for this flow of water waste entirely upon the use of the conduit under Water street and was subject to the public right in the soil of that highway and the consequent lawful privilege of diverting such water before it reached the plaintiffs' property. How could the plaintiffs' from 1885 acquire a right to so use Water street? No such right was conveyed to them nor authorized by Congress to be sold and conveyed to them. In fact, the covenants in the deed were not offered in evidence. (Record, bottom of p. 11.) There is another mill mentioned from which water might at times have flowed into the tail-race. This mill was the Hill Mill.

Referring to the Hill Mill the record states (p. 16), "That several years prior to 1898 another mill, known as the Hill Mill was erected on Water street; that from that time said Hill Mill was supplied with an independent flow of water from said canal" (but how acquired and for what length of time or under what arrangement with the canal corporation, is not stated).

This water "furnished the motive power for the running of that mill; that at that time under a verbal arrangement made between Major Hill and the plaintiffs' an underground pipe was constructed which carried said water after it left the wheel of said Hill Mill under said Water street and through and under the northern part of said fish wharf property to

said tail-race at a point near the north end of said tail-race; and that by means thereof the water which ran from said Hill Mill flowed into and was added to the water in said tail-race, which came from said other mills. Said Hill died on November 25, 1899." The conditions and terms of the verbal arrangement between the planitiffs' and Hill are not stated. Whether such arrangement was a mere license to Hill to allow this waste water when his mill was operated to flow over the plaintiffs' land, which is the probability from the indefiniteness with which plaintiffs' left the case on this point, or what it in fact was, does not appear.

Neither is it explained, nor is any attempt made to explain, how these parties could, by verbal arrangement or any convention, acquire a right as against the District of Columbia to use Water street as a conduit for this waste water and without the permission or consent of the municipality become vested with an incorporeal hereditament therein. Nor does the record show whether Hill ever operated his mill for any particular period after he erected it. Nor does it appear that the water from the Hill Mill was of sufficient quantity to be of any value whatever. We are unable to appreciate the value of this evidence respecting the Hill Mill for any purpose whatever.

It must be noticed that this Hill Mill was not the original mill on that site, but one of new construction.

The Notice and Means of Knowledge of the Plaintiffs of the Existence of the Public Sewer on the Land Before Their Purchase.

"Shortly before the plaintiffs made the purchase, George G. Boteler, one of the plaintiffs, went upon the property and observed that there was water flowing through the tail-race shown on the plat" (Record, bottom p. 14); that is, sewer and waste water commingled. The witness with much acute-

ness testifies (Record, top p. 15) "that when he went *on the plaintiffs' property to look it over prior to the purchase of it*, he had no knowledge of sewer there." At that particular point, he says and means to say—but he had the means and knowledge and abundant notice that the main sewer of Georgetown then had this tail-race for its outlet.

He says that when he "went to look at this property the sewer passed under the canal here (indicating on the plat) and through here." (Record, p. 15.) He had knowledge, therefore, that the sewer *then* passed under the canal. The record shows he then knew "it was an open sewer running under Herr's Mill;" that is, the mill immediately north of Cissel's Mill. The physical conditions at that time were the same as they were in 1899 when the District changed the course of the sewer from the land of the plaintiffs. The plaintiffs or one of them knew the sewer ran under the canal and under the mills, and if he or they did not know it emptied into the tail-race, it was because no investigation was made of such an apparently singular disappearance of it from a plain, natural outlet. If the plaintiffs did not then have actual knowledge of the existence of this sewer on their land, they had the means of knowledge.

The Cause of Action of Plaintiffs Respecting the Damages Claimed.

It appears that in or about November, 1899, there was flowing through said tail-race *exclusive of water that came from the sewer*, the equivalent of fifty-nine hundred cubic feet of water per minute, *which did not include the water from the Hill Mill;* that this power would have been made valuable for manufacturing purposes on the premises but for the sewer." (Record, top p. 21, testimony of John Fitz.) "Such water power added to the rental value of the said property from $1,100 to $1,600 per annum." (Record, middle p. 19.)

It further appeared that the rent of the property was $900 per annum, but "that at all times during the three years immediately preceding the bringing of this suit, there were offensive odors from the sewage matter in said tail-race, which penetrated into said warehouse and over all of said property; that after heavy rains the offensive odors from this cause on said property were so offensive as to compel people who were near the same to go away, the stench being intolerable; and that the prevalence of this stench during said period of three years reduced the rental value of said premises during said period not less than $300 per annum." (Record, bottom p. 19 and top p. 20.)

One of the plaintiffs (Boteler), while upon the stand, in this connection, tesitfied that on the 27th day of February, 1899, said date being within three years prior to the bringing of this suit, he made soundings of the water in front of the plaintiffs' wharf; that the effect of the sewage coming out of the tail-race was that it decreased the depth of the water in front of this wharf,* there being seven or eight feet less depth of water immediately in front of the sewer and thirty or forty feet below the mouth thereof than there was further out and below. The result of the witness's soundings was that the depth of the water ranged from seventeen and a half feet out some little distance from the wharf and out in the river to nine and a half feet right in front of the wharf. The said depth of nine and a half feet precluded the possibility of bringing close to the wharf of the plaintiffs' vessel drawing more than said nine and a half feet." (Record, p. 22.)

If the plaintiffs are entitled to hold the District of Columbia liable for the maintenance and diversion of the sewer, then their claim is reduced to the question of their right to use the waste water from two mills, for loss of rent occasioned

* [Note: This expression by the witness was mere opinion which it does not appear he was competent to give. He does not state for what length of time, if any, the sewage dcreased the depth, for what the depth of water there was when plaintiffs purchased does not appear.]

from January 8, 1898, to January 15, 1899, by reason of the offensive odors emanating from the sewer on their premises, and lessening of the depth of water in front of their wharf because of the sewer, between the same dates.

We do not concede the premises which the planitiffs must necessarily establish; and we deny that the legal conclusions which they assert would result if such premises be conceded.

The court below directed a verdict against the defendant on the second count of the declaration over due exception. (Record, p. 23.) This ruling was based upon the entry of the defendant on the plaintiffs' land as charged in the second count of the declaration (Record, bottom p. 3). Such entry was made (Record, p. 18). We do not concede the correctness of the ruling below on the second count of the declaration, and claim that a verdict should have been directed in favor of the defendant on all counts of the declaration.

ASSIGNMENT OF ERRORS.

1. The court erred in failing to direct a verdict in favor of the District of Columbia on all the counts in the declaration and in directing a verdict against it on the second count in the declaration.

2. The court erred in admitting the deed to the plaintiffs for any purpose respecting the several alleged causes of action in the declaration.

3. The court erred in failing to rule that on the pleadings and as matter of law the District of Columbia was not liable or its entry on the land conveyed to the plaintiffs.

ARGUMENT.

I.

THE COMMISSIONERS OF THE DISTRICT OF COLUMBIA AS THE AGENTS OF THE UNITED STATES HAD NO AUTHORITY TO CONVEY THE PROPERTY AS DESCRIBED IN THE DEED TO THE PLAINTIFFS BURDENED WITH EASEMENTS CLAIMED BY THEM.

The purpose of the above proposition is to maintain that Congress by its grant intended to "sell and convey" *only the "Fish-wharf on Square* 6;" that the Commissioners had no authority to convey beyond the grant, which did not include the rights asserted by plaintiffs; that evidence that the property was commonly known as the "fish-wharf" property (Record, pp. 11 and 12), if admissible, does not extend the granted authority by Congress further than the then actual condition of the land burdened with an apparent public easement; that no water power rights were described or intended to be sold; and that the conveyance to the "middle of the channel" of the Potomac River is void and was not contemplated by Congress.

It is not necessary to claim that the plaintiffs' derived no title to the land outside of the tail-race, but we deny that Congress authorized the grant of the bed of this public sewer during its existence, even had power existed to make such grant.

"It is a well-settled rule of construction of grants by the legislature to corporations, whether public or private, that only such powers and rights can be exercised under them as are clearly comprehended within the words of the act or derived therefrom by necessary implication, regard being had to the objects of the grant. Any ambiguity or doubt arising

out of the terms used by the legislature must be resolved in favor of the public. A forced interpretation the court is not at liberty to give. If the meaning of the words be doubtful, they shall be taken most strongly against the grantee and for the Government, and therefore should not be extended by implication beyond the natural and obvious meaning of the words; and if these do not support the claim, it must fall."

Minturn *vs.* Larue *et al.*, 23 How. 435.

"In its streets, wharves, cemeteries, hospitals, courthouses, and other public buildings, the corporation has no proprietary rights distinct from the trust for the pubilc. It holds them for public use, and to no other use can they be appropriated without special legislative sanction. It would be a perversion of that trust to apply them to other uses."

Concurring opinion of Justice Field in Meriwether *vs.* Garret, 102 U. S. 513.

"A municipal corporation has no implied or incidental authority to alien, or dispose of for its benefit, property dedicated to or held by it in trust for the public use, or to extinguish the public uses in such property."

2 Dillon Mun. Cor. sec. 650.

"Such property as is held in. trust for the public use as streets, alleys, public squares, wharves, etc., can no more be disposed of by the corporation in violation of the trust than trust property held by an individual."

20 Am. & Eng. Ency. Law (2d ed.) 1188.

" It is not in the power of a vendor to create any rights not connected with the use or enjoyment of the land, and annex them to it." Ackroyd *vs.* Smith, 10 Com. Bench 187; Linthicum *vs.* Roy, 9 Wall. 243. The latter case went up from this District and involved questions respecting the grant of a fish-wharf. Fish-wharf rights have indeed been often the subject of judicial consideration in this District. (Mayor, etc., of Georgetown *vs.* Chew, 5 Cr. C. C. 508.)

The right of wharfage may have remained as an appurtenant to the wharf for that right was annexed by law."

109 U. S. 682.

"A statute does not give by impilcation any powers not absolutely essential to the privilege or property granted."

Endlich Interp. of Stats., p. 598.

The contention now made respecting the proper construction of this Congresional grant is strengthened by a consideration of the effect, clearly not intended by Congress, of the deed to the plaintiffs, which projects the southern line of these lots to the middle of the channel of the Potomac River.

It was not the intention of Congress to "subject lands lying beneath the waters of the Potomac and within the limits of the District of Columbia to sale" by the statutes set forth in this record (see Morris *vs.* United States, 174 U.S. 234, and authorities there cited).

"The rights of property and sovereignty over the River Potomac, with its shores and adjacent lands, devolved upon the United States as the common property of the people, to be used solely for public purposes for the benefit of the seat of government, (and) *could not be held as vendible to private persons.*"

United States *vs.* Morris, 23 W. L. R. 771.
Mayor, etc., of New Orleans *vs.* U. S., 10 Pet. 662.
St. Paul, etc., R. R. Co. *vs.* Schurmeier, 7 Wall. 272.

The covenants in the deed are no part of the record (Record, bottom p. 11), and if they were, Congress did not authorize them.

Besides, the acts of Congress neither authorized the conveyance of property held by the United States in its sovereign right, such as the land beneath the tide waters of a navigable river, nor the property of the District of Columbia which it held in trust for the whole community, such as sewer rights.

The act (Record, p. 11) says "that the Commissioners of

the District of Columbia, be, and they are hereby, authorized and empowered to sell and convey, * * * the following named property in the City of Georgetown belonging to said District—Fish-wharf on Square 6."

Every consideration points alone to the sale of the *private* property of the District burdened with the public easements. This *private* property was *Fish-wharf property, not water-power property.*

It is certain that the District of Columbia did not sell its sewer rights in these premises.

II.

THE OPEN SEWER OR WATER WAY, HAVING EXISTED CONTINUOUSLY FOR MORE THAN TWENTY YEARS BEFORE THE PURCHASE OF THE PROPERTY, CONSTITUDED AN APPARENT AND CONTINUOUS PUBLIC EASEMENT OF WHICH PLAINTIFFS HAD NOTICE, AND SUBJECT TO WHICH AND ALL ITS INCIDENTS, THEY ACQUIRED TITLE.

The purchasers "had knowledge sufficient to put (them) on inquiry."

McPherson *vs.* Acker, MacA. and M. 159.

In Pyer *vs.* Carter 1 H. & N. 916, it is declared that by apparent easements must be understood those which may be seen or known on a careful inspection by a person ordinarily conversant with the subject.

Pyer *vs.* Carter 1 H. & N. 916.

It is not of the essence of continuousness "as applied to a water course, that the water should flow of itself continuously, but the test is that the artificial apparatus by which its flow is produced is of a permanent nature." Accordingly it was held that a water-pipe conveying water from a well, though both

well and pipe were completely hidden from view, was an apparent easement and one dealing with the property with knowledge of such condition is chargeable with notice of an apparent easement.

Larsen *vs.* Peterson, 53 N. J. Eq. 88-94.
De Luze *vs.* Bradbury, 25 N. J. Eq. 70.

The acquiesence of the plaintiffs in the continuance of the public sewer, their application to have it covered over, and their failure to attempt the use of water-power for a long period of time subsequent to their purchase, affords an interpretation as between the District and them of the deed, that they acquired no appurtenant right to water-power while the public held a sewer easement therein.

An easement obviously and notoriously affecting the physical condition of the land at the time of its sale is not embraced in a general covenant against incumbrances.

Kutz *vs.* McCune, 22 Wis. 628.

Where there is a servitude imposed upon the land which is visible to the eye, and which affects not the title but the physical condition of the property, *it is presumed that the grantee took the property in contemplation of such condition and with reference thereto*, and such incumbrance is not within a general warranty in a deed.

Memmert *vs.* McKeen, 112 Pa. St. 315.

"If there be a *public road* or *highway*, open and in use upon it, (the land sold) he (the purchaser) must be taken to have seen it and to have fixed, in his own mind, the price that he is willing to give for the land with a reference to the road either making the price less or more as he considered the road to be injurious or advantageous to the occupation and enjoyment of the land."

Patterson *vs.* Arthur 9 Watts, 154.

Whether the existence of a servitude or burthen upon the property sold to, and the enjoyment thereof by the owner, constitute a breach of the covenant of special warranty, depends upon the apparent and ostensible condition of the property at the time of sale. And as the wall had been erected, and the lights therein were plainly to be seen when the appellant purchased the property overlooked by them, it is but rational to conclude that he contracted with reference to that condition of the property, and that the price was regulated accordingly. The parties, in the absence of anything to the contrary, are presumed to have contracted with reference to the then state and condition of the property; and if an easement to which it is subject be open and visible, and of a continuous character, the purchaser is supposed to have been willing to take the property, as it was at the time, subject to such burthen. That being so, the covenants in the deed must likewise be construed with reference to the condition of the property at the time of conveyance. The grantor, by his covenant, warranted the premises as they were, and by no means intended to warrant against an existing easement, which was open and visible to the appelllant, and over which the former had no power or control whatever. To construe the covenant to embrace such subject would most likely defeat the understanding and intention of the parties; certainly of the grantor.

James *vs.* Jenkins, 34 Md. 10-11.

The riparian proprietors of lands, bounded on the Ohio River in this State, own the fee in lands to low water mark, subject to the easement of the public in that portion between the high and low water mark, with the right of the State to control the same for the purposes of navigation and commerce without compensation to the owner.

When land lying on the Ohio River is conveyed by deed with general warranty and calling for low water mark on said river as one of its boundaries, *the warranty is not broken*

by reason of the fact that the public owns an easement therein,. and she or one of her municipal corporations has perpetually enjoined the purchaser from building a wharf or landing on the land below high water mark without his obtaining a license to do so. Warranty was illegal and void in itself and no redress can be obtained for its breach.

Barre *vs.* Fleming, 29 W. Va. 314–325.

Where a vendor conveys by warrantee deed, without express reservation of any right to allow a mill pond to overflow the land conveyed, the subsequent use of the land sold as before, is not a breach of the vendor's covenant against incumbrances.

Harwood *vs.* Benton, 32 Vt. 724.

"It is laid down as an unquestioned proposition, that 'upon the severance of a heritage, a grant will be implied of all those continuous and apparent easements which have in fact been used by the owner during the unity, though they have no legal existence as easements;' *and the doctrine is equally well established that the law will imply a reservation of like easements in favor of the part of the heritage retained by such grantor.*"

Gale & Wheatly on Easements, Ch. 5, id. p. 733.

It is well settled that the covenant for seizin is not broken by the existence of easements or incumbrances which do not strike at the technical seizin of the purchaser. Thus the existence of a highway over part of the land conveyed is held no breach of this covenant, since it has been consistently settled, that although the public may have a right of passage over the way, the freehold technically remains in the owner of the soil.

Rawle on Covenants p. 83.

III.

THE CITY OF GEORGETOWN AND ITS SUCCESSOR, THE DISTRICT OF COLUMBIA, BY THE SAID USE OF THE TAIL-RACE BEFORE AND AFTER THE PLAINTIFFS' PURCHASE ACQUIRED A RIGHT TO THIS WATER-COURSE AS A PUBLIC SEWER, AND PRIVATE OWNERS THEREBY DEVOTED AND DEDICATED THEIR RIGHTS THERETO, IF ANY, TO THE PUBLIC.

The act of Congress approved March 3, 1805, amending the charter of Georgetown, gave it power "To make and keep in repair all necessary sewers and drains, and to pass regulations for the preservation of the same." (Record, middle p. 17.) Various ordinances of Georgetown respecting the extension and repair of the arch over Water street were passed by that municipality. (Record, pp. 16–17.)

And "the right of action by a lot owner grows, not out of the adoption of the stream as a sewer *which was an act wholly within the power of the municipality*, but out of its own negligence in not keeping the sewer in at least as good condition as it found it."

Blizzard *vs.* Danville, 175 Pa. St., 479, 483.

Respectable authorities hold that independently of long use and public and private acquiesence, a municipality is not subject to private action for the use of a stream of water for sewage purposes

10 Am. and Eng. Ency. Law, 248.

"In our opinion, the legal results arising from this state of facts, are, that the city has acquired the right thus to use this stream wherever it crosses or flows along the streets, which were from time to time laid out over the land through which the stream runs, by virtue of its power to open and condemn streets, and by *adoption* wherever it passes through

private property, and where the archi ng or covering of it may have been originally done by private owners; that it must be presumed that such private owners have surrendered, devoted, or dedicated their right in the bed of the stream to the public for the purposes of a public sewer, and that the city and public have *accepted* such dedication or surrender; and that in consequence of its having thus become a public sewer, the city is bound to keep it in repair, and is responsible for injury resulting from negligence in making necessary repairs, as well as from the negligence or unskillful manner in which the work of repairing is actually done. As to the power of the city under the clause of its charter already cited to acquire by dedication, adoption and acceptance, the right thus to use this stream where it flowed through or under private property, we entertain no doubt whatever. This right of acquisition by adoption and dedication, and the consequent responsibility on the part of a municipal corporation, is or the public is sustained by many well-considered cases where the question has arisen under a similar state of facts."

Koranz *vs.* Major, 64 Md., 491–496–497, citing
Yates *vs.* Judd, 18 Wis. 118.
City of Indianapolis *vs.* Lawyer, 38 Ind. 348.
House *vs.* Town of Fulton, 34 Wis. 608.
Emory *vs.* City of Lowel, 104 Mass. 13.

A municipality may connect its sewers with any *natural* stream of water.

Munn *vs.* Pittsburg, 40 Pa. St. 364. Opinion by Strong, J.

In Massachusetts, in Merrifield *vs.* City of Worcester, 110 Mass. 216, 14 Am. Rep. 592, it was held that if the injury to plaintiffs' boilers and machinery, which had been damaged by the pollution of the stream, was occasioned by any reasonable use which the defendant municipality might have made of the stream, or was the result of the plan of sewerage adopted by the city, he could not recover; but if it was due to improper construction and unreasonable use of sewers, he could recover.

In Indiana the doctrine seems to be that legislative authority to construct a sewer system carries with it the right to discharge the sewer into any natural stream, regardless of the consequences of contamination. Thus in a case where plaintiffs' owned a woolen mill situated on the stream a short distance below the city, and used its waters in washing and dying their wool, it was held that the corporation, which had constructed its sewers according to modern plans, and along the lines of natural drainage, was not liable for any injury resulting to plaintiffs' property or business from the polluted condition of the stream. City of Richmond *vs.* Test, 8 Ind. App. 482; (48 N. E. Rep. 610).

And in Valparaiso *vs.* Hagen, 153 Ind. 337; 54 N. E. Rep. 1062, 48 R. A. 707, the city drained its sewage into a natural stream by which it was cast upon the pasture land of a lower proprietor, destroying his grass and depriving him of the use of his land. It was held not to be a *taking* of private property within the constitutional inhibition, but a mere consequential injury for which the corporation was not liable, and that the municipality, acting in conformity to the statutes, skilfully and without negligence or malice, pursuing the only natural and reasonable possible line of drainage, would not be enjoined from discharging its sewage into the stream.

"The duties of the municipal authorities in adopting a general plan of drainage, and determining when and where sewers shall be built, of what size and at what level, are fo a quasi-judicial nature, involving the exercise, and depending upon considerations affecting the public health and general convenience throughout an extensive territority; and the exercise of such judgment and discretion in the selection and adoption of the general plan or system of drainage is not subject to revision by a court or a jury in a private action for not sufficiently draining a particular lot of land."

Per Gray, J. In Johnson *vs.* D. C., 118, U. S. 19.

IV.

If the Conveyance of the Land Contained in the Tail-Race Was Authorized by Congress, Such Deed Did Not Authorize the Plaintiffs to Draw Water from Such Channel as Against the Public.

It has already been shown that there is nothing in the record to establish that the use of any natural stream of water was avaliable to the plaintiffs for any purpose. Waste water alone is the contended basis of their claim.

There was no grant, either express or implied, by the corporation of Georgetown or its successor, the District of Columbia, of the use of Water street as a conduit for the flow of water from the mills over the plaintiffs' land, nor was there any use of the same by the plaintiffs. Without such easement in Water street, the plaintiffs could in no event ever have acquired any water power privileges.

One who acquires title to land across which water runs in an artificial channel does not by that fact acquire right to draw water from such channel.

The Fox River Co. *vs.* Kelley, 72 Wis. 288.

Where parties had by parol leave *used* waste water from a ditch, such persons acquired no riparian right thereto.

The court said: "The plaintiffs never acquired any riparian right to the water, because it never flowed to or over their land in any natural channel whatsoever; that the only water which came to them was 'waste water,' which they got through the revocable license of the defendants and their predecessors in interest."

Green *vs.* Carotta, 72 Cal. 267, 269.

A controlling fact is that the water power in controversy has never been used.

Elevator Co. *vs.* Cincinnati, 30 Ohio St. 635.

The right to surplus water and the right to lease the same for private uses, is an incident of the public use of the canal for purposes of navigation. The canals of the State were authorized, constructed and maintained for public purposes, and not to afford water power, to be leased or sold for private use. The latter use is subordinate, and the right to the same may be terminated whenever the State, in the exercise of its discretion, abandons or relinquishes the public use.

Elevator Co. *vs.* Cincinnati, 30 Ohio St. 630.

"The right to water, or water right, as it is commonly called, is only acquired by an actual appropriation and use of the water. The property is not in the *corpus* of the water, but is only in the *use.*"

N. C. & S. C. Co. *vs.* Kidd, 37 Cal. 310.

The plaintiffs have no right of action for the diversion of the water from their land not having used it.

N. C. & S. C. Co. *vs.* Kidd, 37 Cal. 284–311.

Neither the plaintiffs nor the mill owners acquired any prescriptive right to have this waste water flow over this land by its mere permissive flowing for a period of twenty years without proof that such use was *adverse.*

Smith *vs.* Miller, 11 Gray 145.
Medford *vs.* Pratt, 4 Pick. 222–228.
Sargent *vs.* Ballard, 9 Pick. 251.
Arnold *vs.* Stevens, 24 Pick. 106–110.
Rowland *vs.* Wolfe, 1 Bailey 56.

No action will lie for an injury by *diversion* of an artificial water course *actually used,* where it appears that the enjoyment is not of a permanent character, and where the interruption is by a person who stands in the nature of a grantor.

Clearly the District of Columbia had the right to divert

this sewer without authority from any proprietor even had the plaintiffs used the waste water.

Wood *vs.* Waud, 3 Exch. 748.
Greatrex *vs.* Hayward, 8 Exch. 291.
Arkwright *vs.* Gell, 5 M. & W. 203.
Angell on Water Courses secs. 206 and 206*a*.

V.

This Claimed Right to Waste Water as Power, Even Had it Been Adverse as Against the Mills' Owners, Could Not, in the Absence of User of the Power, Have Created Any Estoppel Against the District of Columbia, nor Prevented it by Reason of Lapse of Time from Maintaining This Public Sewer Over the Plaintiffs' Property.

The better rule seems to be that where a municipality seeks to assert rights which are of a public nature, and such as pertain purely to governmental affairs, the exemption in favor of sovereignty applies and the Statute of Limitations will not constitute a bar unless it is expressly so provided.

19 Am. & Eng. Ency. Law (2d ed.) 191, where the authorities are collected.

This distinction was pointed out in Metropolitan R. R. Co. *vs.* D. C., 132 U. S. 1–12. The court said: "What may be the rule in regard to purprestures and public nuisances, by encroachments upon the highways and other public places, is not necessary to determine. They are generally offences against the sovereign power itself, and, as such, no length of time can protect them."

It would seem to follow that the plaintiffs could acquire no adverse right as against the District of Columbia whereby it colud be prevented after any length of time from asserting its right to use this artificial water way for the continuance of its sewer.

No recovery can be had for the foul odors complained of, because the plaintiffs acquired title with notice of the existence of the sewer. No claim is made that the land of the plaintiffs was injured by sewage deposits.

The waste water flushed this sewer, and if a public nuisance was created the mnuicipality could have been indicted for it. The plaintiffs are inconsistent in claiming damages for the existence of the sewer and in making claim because it was removed from their land. Then, too, if any defect existed, it was one of plan.

VI.

There is no Liability for the Entry on the Channel of the Sewer on Plaintiffs' Property and for Making the Sewer Constructjon Which Diverted the Sewer.

The allegation in the pleadings is contained in the Record at pp. 3 and 4, and the evidence will be found on p. 18.

First. The declaration is not based on any *taking* of the plaintiffs' property, but is *in case* for the wrongful diversion of the stream of water. The court below therefore erred in directing a verdict for this trespass under the pleadings.

Second. Under the authorities previously cited the District of Columbia had the right to enter upon the land to repair or change this sewer and would have been liable on proper case, if it had failed to do so or been guilty of *negligence* in doing the work. There is no claim of negligence. The complaint is that it was too well done. For the purpose of such contsruction the District had an *easement of access.*

Riverdale Park Co. *vs.* Wescott, 74 Md. 311.

10 Am. & Eng. Ency. Law (2d ed.) 428.

We claim that if necessary for the public health, the District of Columbia, in the exercise of lawful rights, could enter

on this land and arch over the whole course of this sewer to its outlet. This right the plaintiffs', previous to suit, had conceded. (Record, p. 15, letter of April 24, 1885.) Again, the construction of the arch was simply a continued use of this sewer right on that part of plaintiffs' land where a sewer had previously existed.

VII.

The Denial of the Legal Right of the District of Columbia to Use This Land For Sewer Purposes and by This Construction Divert the Sewer Creates the Alternative That is no Corporate Liability.

The District of Columbia is a municipal corporation of limited powers. It has no right of eminent domain nor power to give compensation for the taking of private property.

In the absence of statutory authority, neither the board of health nor the city council of a city has any power to erect a dam on a person's land, without his consent, for the purpose of abating a nuisance existing on adjacent land. A city is not responsible for damages resulting from work done under the supposed authority of illegal and void votes of the city council; and it is immaterial that the work was done in a negligent manner.

Cavanaugh *vs.* City of Boston, 139 Mass. 426.

"The difficulty with the plaintiffs' case is, that neither the board of health nor the city government had any authority to abate the nuisance in the manner which was adopted. That manner was by the erection of a dam, the easterly portion of which was built across the flats *and upon the upland of the plaintiffs'*, for the purpose of raising the water so as to flow over other flats away from the flats of the plaintiffs; the plaintiffs' evidence tending to show that no nuisance existed on their own flats. This was an occupation of the plaintiffs' land which the city had no power to make, without the

plaintiffs' consent. *No statute conferred the power of appropriating the plaintiffs' property for public uses, nor provided compensation to them for damages sustained by such appropriation.*" There is no general statute vesting in these bodies (boards of health and city governments) the right of eminent domain, or making provision for the compensation of persons whose property may be taken. The genera phrases contained in the city ordinances to exercise the powers vested in them for the preservation of the public health in any manner which they may prescribe, cannot be held to give them authority to take private property for public uses. No such power existed in the body which enacted the city ordinances. In the present case, the acts of which the plaintiffs' complain, amount to an occupation of their land for the purpose of building a dam thereon in such manner that clearly it was an appropriation of the land to a public use. * * * Such an act was clearly illegal."

Cavanaugh *vs.* City of Boston, 139 Mass. 434–435.

"The trustees, in executing the duties imposed upon them by the charter, act as agents of the corporators, and the latter can be bound only when the trustees act within the scope of their powers. * * * The charter prescribes the powers of the trustees, beyond which they can not go; if they do, they act as individuals, and not in the character of trustees, and their proceedings, of course, are inoperative and void."

Cuyler *vs.* Rochester, 12 Wend. 168.

In Mitchell *vs.* Rockland, 52 Me. 118, reaffirming S. C. 45 Me. 496; 41 Me. 363, where the health officers of a town, without authority of law, took possession of the plaintiff's vessel, and in process of fumigation, set it on fire, the town was held not liable.

In order to charge a corporation in an action on the case for negligence in the performance of a public work, the law must have imposed a duty *or conferred an authority to do such work.*

Thus were the officers and agents of a city corporation assumed to build a bridge, under the authority of a statue

not constitutionally passed for want of a two-thirds vote, and the bridge fell in consequence of the negligent construction thereof; it was held that the corporation was not liable to an action at the suit of a person injured by the accident.

Albany *vs.* Cunliff, 2 N. Y. 165.
Boyland *vs.* N. Y., 1 Sandf. Law 27, ~~came on first~~ at public meeting.

When they transcend these powers, their acts although done *colore officii*, and upon pretence of law, are no more binding than would be the acts of an agent in any other case where his act is beyond the scope of the authority conferred. And if the mnuicipality has no authority to authorize the act to be done, it being *ultra vires*, they have no power to adopt it after it is done.

Horn *vs.* Mayor, 30 Md. 219.
Mayor *vs.* Eshbach, 18 Md. 276.
State *vs.* Kirkley, 29 Md. 85.

VIII.

The Wharf Privileges of the Plaintiffs Were Burdened With the Sewer Easement, Hence There is no Liability for Lessening the Depth of the Water at the Wharf.

If the sewer had been constructed subsequent to the plaintiffs' purchase, a different question would be presented.

Under the common law of Massachussetts the owners of lands bordering on tidewater own the space between high and low water marks, subject to the right of the public to use the same for purposes of navigation, while the tide is in, until the same shall have been redeemed, either by filling in, or by the

erection of wharves, seawalls or other structures. Hence the City of Boston, owning the fee of a strip which extended out to deep water between two private wharves, and which was used by the wharf owners as a dock, was not liable to them for destroying its usefulness as a dock by constructing a sewer therein. It was said, however, that the city would be liable if the sewer so constructed was not carried out sufficiently far to discharge its contents where they would be swept off by the tides, but caused an accumulation of matter at the outer end of plaintiffs' wharves, insomuch that vessels could not approach them with the same depth of water as formerly.

Richardson *vs.* City of Boston, 19 How. 263.

Again, while this work was done in the name of the District, it was in reality done with consent of the United States and was governmental in its nature and no liability attached for the mere constrcution of the use of a landing by a riparian owner.

Gibson *vs.* U. S., 166 U. S. 269.
Scranton *vs.* Wheeler, 179 U. S. 141.

Where else but in the Potomac can the main sewage of the District of Columbia be emptied?

Special discussion of the plaintiffs' exceptions to the ruling of the court on matters of evidence, is omitted because the principles asserted in this brief seem to render such discussion unnecessary.

In conclusion we respectfully submit that the action of the court below in favor of the District of Columbia should be affirmed and that because error in directing a verdict and judgment for nominal damages on the second count of the

declaration, the ruling below on that point should be reversed with direction to enter judgment thereon in favor of the District of Columbia.

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